No. 92-1837

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1992

JAMES BLODGETT, Superintendent of Washington State Penitentiary, Walla Walla, Washington,

Petitioner,

vs.

CHARLES R. CAMPBELL,

Respondent.

ON PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PROHIBITION OR MANDAMUS, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE PROHIBITION OR MANDAMUS

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit violate its duty to promptly decide the appeal of Charles Campbell's second capital habeas petition by postponing consideration of the appeal and issuing an interlocutory order requiring the district court to conduct a second evidentiary hearing when: (1) the appeal has been pending before the Ninth Circuit for more than four years; (2) the district court conducted a full and fair evidentiary hearing in 1989; and (3) the Ninth Circuit has not ruled the original evidentiary hearing was in any way defective?

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No.

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ON PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI, OR IN THE ALTERNATIVE, PROHIBITION OR MANDAMUS, TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner James Blodgett respectfully prays that an extraordinary writ of certiorari, or, in the alternative, prohibition or mandamus, issue to summarily vacate the April 28, 1993

order of the United States Court of Appeals for the Ninth Circuit, pursuant to 28 U.S.C. § 1651(a), the All Writs Act.[1]

I. OPINIONS BELOW[2]

In its April 28, 1993 order, the Ninth Circuit, sitting *en banc*, remanded Campbell's second habeas corpus petition to the district court for another evidentiary hearing because the *en banc* court "has chosen to address whether hanging is cruel and unusual punishment under the Eighth Amendment." *See* Appendix 1.[3] Prior to seeking relief in this Court, the State filed an emergency motion with the Ninth Circuit, requesting that the court reconsider and vacate its order of remand and decide Campbell's second appeal without further delay. The Ninth Circuit denied that motion, with Circuit Judges O'Scannlain and Kleinfeld dissenting, on May 7, 1993. *See*

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[1]Petitioner will be referred to hereafter as the State.

[2]Other pertinent opinions in this case were previously provided to this Court as appendices in the State's 1991 mandamus petition. *See* Petition for Writ of Mandamus, *In re Blodgett*, No. 91-716.

[3]The district court has scheduled the evidentiary hearing for May 24-26, 1993. The holding of the evidentiary hearing will not render this petition moot because the State will be prejudiced both by the evidentiary hearing itself and the subsequent appellate review of the results of that hearing by the Ninth Circuit. The State has not requested a stay of the Ninth Circuit's order because the State refuses to contribute to further delay and is fully prepared to proceed with the defense of Campbell's claims regarding hanging.

Appendix 2. Consequently, the State has exhausted all other possibilities of vacating the order of remand.[4]

II. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a)[5] and United States Supreme Court Rule 20.1.

III. STATEMENT OF THE CASE

A. Procedural History – 1982 to 1989

Campbell was convicted and sentenced to death for the brutal slaying on April 14, 1982 of two women and an eight-year old girl. The Washington Supreme Court affirmed his conviction and death sentence on direct review, and this Court denied certiorari. *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985). Campbell's

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[4]On May 10, 1993, the State filed an Application with Circuit Justice O'Connor to vacate the Ninth Circuit's interlocutory order of remand. The Application, containing arguments virtually identical to those in this petition, was denied without prejudice because Justice O'Connor determined that only the full Court could grant the relief requested by the State. *See Blodgett v. Campbell*, No. A-851. The State respectfully requests this Court to consider any response to the State's Application filed by Campbell as his response to this petition, thereby allowing the Court to rule on this petition immediately.

[5]28 U.S.C. § 1651(a) states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

first federal habeas corpus petition was denied after an evidentiary hearing. The Ninth Circuit affirmed the district court's denial of Campbell's first habeas petition and this Court denied certiorari. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988).

On February 15, 1989, the trial court issued a death warrant setting Campbell's execution for March 30, 1989. Campbell, represented by counsel, filed a notice of appeal and motion for stay of execution, raising *inter alia* several conclusory and factually unsupported challenges to hanging as an execution method. On March 23, 1989, the Washington Supreme Court rejected all of Campbell's challenges to hanging as a method of execution. In a unanimous opinion, the court upheld the constitutionality of hanging as a method of execution, declining to revisit *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). *See State v. Campbell*, 112 Wn.2d 186, 192, 770 P.2d 620 (1989). The Court also denied Campbell's motion for a stay of execution in an unpublished opinion, concluding that none of the issues raised warranted further consideration.

B. Procedural History – 1989 to Present

The delays and difficulties the State has faced in Campbell's case have all centered around the Ninth Circuit's actions and inaction from March 28, 1989 to the present in Campbell's second habeas corpus petition. The following is a summary of the relevant federal court procedural history in Campbell's second habeas case:

1. *March 24, 1989*: The United States District Court for the Western District of Washington (Coughenour, J.) summoned the attorneys representing Campbell and the State to chambers to discuss whether and when Campbell would be filing a second federal habeas corpus petition and motion for a stay of execution.[6] The district court noted that it had already reviewed copies of the state court briefs and opinions, fully apprising itself of the issues likely to be raised in Campbell's second habeas petition.

Campbell's attorneys informed the court that they intended to file a federal habeas petition and a motion for a stay of execution the following Monday, March 27, 1989. The district court instructed the parties that they should be prepared to conduct an evidentiary hearing at that time, but did not in any way limit the issues Campbell could raise or the evidence he could present in support of his petition. The court further ordered Campbell's presence at the evidentiary hearing and requested that Campbell's former trial counsel also be available regarding the ineffective assistance of counsel claim. Campbell's attorneys indicated that conducting the evidentiary hearing the following Monday would be "difficult," but they voiced no specific objection to the court's expedited schedule nor did they

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[6]Judge Coughenour had presided over the proceedings in Campbell's first federal habeas petition in 1985-86. *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). The entire state court record was lodged with the court in those proceedings, and the court conducted a thorough review of that record (and held an evidentiary hearing) before ruling on the merits of Campbell's first petition. Thus, the district court was fully capable of conducting a hearing on the merits of Campbell's second habeas petition in connection with the motion for a stay of execution.

indicate what evidence, if any, they would be unable to present on March 27, 1989.

2. *March 27, 1989*: Campbell filed his second federal habeas petition, which included three claims pertaining to hanging as an execution method as well as a motion for stay of execution.[7] At the evidentiary hearing held by the district court on his petition, Campbell offered several affidavits, the testimony of three witnesses, and the testimony of both Campbell's former trial counsel. However, despite the district court's willingness to receive evidence on all of Campbell's claims, none of this evidence pertained to Campbell's hanging claims. Instead, Campbell focused exclusively on the claims concerning his

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[7]The text of Campbell's execution method claims is as follows:

> 5.16 Petitioner will be deprived of his right against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States because his execution will be conducted by hanging pursuant to RCW 10.95.180.
>
> 5.17 Petitioner will be deprived of his right against cruel and unusual punishment under the Eighth Amendment of the Constitution of the United States because petitioner's execution will be by hanging and the State of Washington does not have any person who is qualified to perform an execution by hanging.
>
> 5.18 Petitioner will be deprived of his right against cruel and unusual punishment and freedom of religion under the First and Eighth Amendments to the Constitution of the United States by forcing petitioner to choose death by lethal injection over hanging when petitioner is terrified at the thought of being executed in such a fashion and the possibility of his death being painful and lengthy and petitioner's religious beliefs forbid him from participating in his own demise by electing death by lethal injection over hanging.

waiver of presence at voir dire and his allegations of ineffective assistance of counsel.

The district court explained to Campbell's habeas counsel that it would fully consider the affidavits to be part of the record and repeated its invitation to Campbell to present whatever evidence he desired. The district court also permitted Campbell himself to orally present any additional arguments that were not made by his attorneys and allowed Campbell to take an active role in the presentation of his case. The district court reminded Campbell "[y]ou're going to have a ruling, but I want to make certain that you have the opportunity to present to me what you want to present before I give you that ruling."

During the evidentiary hearing, and in response to statements made by Campbell's counsel and one of the witnesses, the district court reminded the parties of their roles as well as that of the court:

> If you had the opportunity to have been present at last Friday's [status] hearing, I think you would agree that the Court was trying to accommodate counsel and telling counsel that if you wanted to put on evidence, I'd be happy to hear it and setting everything aside so that we could accomplish that. I'm not forcing anybody to go through with this hearing. If you don't want to go forward with putting on evidence, that is fine. We'll stop right now.

Although the district court did not limit Campbell's evidentiary presentation in any way, Campbell offered no evidence and made no offer of proof in support of his three claims regarding hanging. Despite the fact that he was present throughout the entire hearing, Campbell did not testify.

Later that day, after Campbell and his attorneys informed the court that they had no further evidence or arguments to present, the district court issued its Order denying both Campbell's motion for a stay of execution and his petition for writ of habeas corpus. The court rejected Campbell's purely legal challenge to hanging (Claim 5.16), concluding that he had not made a "substantial showing of the violation of a federal right." With respect to Campbell's other two challenges (lack of a qualified hangman and objection to the choice between hanging and lethal injection), the district court observed that Campbell had provided no factual support for his allegations.

3. *March 28, 1989*: Campbell appealed the denial of his second federal habeas petition to the Ninth Circuit and requested a stay of execution. The Ninth Circuit immediately stayed Campbell's execution pending disposition of his appeal. This stay has remained in effect throughout the remainder of the proceedings in Campbell's second appeal.

4. *June 27, 1989*: Oral argument was held before the Ninth Circuit on Campbell's appeal of his second habeas corpus petition.

5. *April 30, 1990*: The State requested that the Ninth Circuit inform the parties as to when the court anticipated reaching a decision in the Campbell case. The court did not respond to the State's inquiry.

6. *October 5, 1990*: The State again requested information from the Ninth Circuit regarding the status of Campbell's second appeal. The Court did not respond to the State's renewed inquiry.

7. *February 21, 1991*: The Ninth Circuit *sua sponte* ordered Campbell's second appeal withdrawn from submission pending the responses of the parties as to whether Campbell had exhausted all claims in his second petition. *Campbell v. Blodgett*, 927 F.2d 444 (9th Cir. 1991).

8. *March 4, 1991*: The State filed a response to the Ninth Circuit's order, demonstrating that Campbell had exhausted his available state remedies and urging the Ninth Circuit to resubmit the case for decision. Counsel for Campbell conceded exhaustion as well.

9. *June 3, 1991*: Campbell gave notice of his intent to file a third federal habeas corpus petition.

10. *August 7, 1991*: The Ninth Circuit granted Campbell's previous motion to dismiss counsel, but denied Campbell's motion to withdraw several issues from appeal. The Ninth Circuit also delayed resolution of the second appeal pending the filing and disposition of Campbell's third habeas corpus petition. *Campbell v. Blodgett*, 940 F.2d 549 (9th Cir. 1991).

11. *September 13, 1991*: Campbell filed his third petition for writ of habeas corpus.

12. *October 25, 1991*: The State filed a petition for a writ of mandamus in this Court. The petition requested this Court to compel the Ninth Circuit to decide Campbell's second habeas appeal without further delay.

13. *January 13, 1992*: This Court issued its opinion denying the petition for a writ of mandamus, "without prejudice to the right of the State to again seek mandamus relief or to request any other extraordinary relief by motion or petition if

unnecessary delays or unwarranted stays occur in the panel's disposition of the" Campbell case. *Blodgett*, ___ U.S. ___, 112 S. Ct. 674, 677 (1992).

14. *January 15, 1992*: The State moved the Ninth Circuit to resubmit the Campbell appeal and to render a prompt decision.

15. *January 16, 1992*: The Ninth Circuit directed the parties to inform the panel of the status of Campbell's third habeas petition and, inexplicably, whether the parties believed the Court should defer decision on the second habeas petition until the district court reached a decision on the third petition.

16. *January 23, 1992*: The State objected to the Ninth Circuit's order and renewed its motion for resubmission and a prompt decision on the second habeas petition. The State argued that the stay of execution carries with it a duty to promptly decide the matter.

17. *March 6, 1992*: The Ninth Circuit ordered the resubmission of Campbell's second appeal.

18. *March 9, 1992*: The district court dismissed Campbell's third habeas corpus petition as a successive petition and an abuse of the writ.

19. *April 1, 1992*: The Ninth Circuit panel issued its opinion affirming the district court's denial of Campbell's second habeas petition. *Campbell v. Blodgett*, 978 F.2d 1502 (9th Cir. 1991).

20. *April 13, 1992*: Rejecting the State's objections to any further extensions of time, the Ninth Circuit granted Campbell's motion for extension of time to file petition for rehearing on the second habeas petition.

21. *April 22, 1992*: The State moved the Ninth Circuit to vacate the stay of execution. The State also moved the Ninth Circuit to vacate the district court's issuance of a certificate of probable cause. In the alternative, the State moved the Ninth Circuit to conduct an expedited review of the third habeas petition.

22. *May 5, 1992*: The Ninth Circuit denied the State's motions to vacate the issuance of the certificate of probable cause, to vacate the stay of execution, and for expedited review.

23. *May 14, 1992*: The State moved the Ninth Circuit to reconsider the denial of the motion for expedited review.

24. *May 15, 1992*: Campbell's counsel and Campbell *pro se* each filed petitions for rehearing with suggestions for rehearing *en banc*.

25. *May 19, 1992*: The State moved for an expedited consideration of the petition for rehearing and to vacate the stay of execution.

26. *October 8, 1992*: The Ninth Circuit ordered the appeal of Campbell's second habeas petition to be reheard *en banc*.

27. *December 24, 1992*: The Ninth Circuit affirmed the district court's denial of Campbell's third habeas corpus petition as a successive petition and an abuse of the writ. *Campbell v. Blodgett*, 982 F.2d 1321 (9th Cir. 1992).

28. *January 20, 1993*: Reargument was heard by the Ninth Circuit *en banc* regarding Campbell's second habeas petition.

29. *January 26, 1993*: The Ninth Circuit granted Campbell an extension of time until January 31, 1993 to file a petition for rehearing regarding his third appeal.

30. *January 29, 1993*: The Ninth Circuit withdrew Campbell's second appeal from submission for twenty-one days and ordered each party to file a supplemental brief on the following issues: (1) did the district court err in not granting Campbell's request for an evidentiary hearing to determine whether hanging is cruel and unusual punishment; (2) is hanging cruel and unusual punishment; (3) was Campbell's application for writ of habeas corpus based upon issue 2 an abuse of the writ.

31. *April 28, 1993*: The Ninth Circuit *en banc* issued its order in Campbell's second appeal, remanding the case to the district court for an evidentiary hearing on the issue of whether hanging is cruel and unusual punishment under the Eighth Amendment.

32. *May 4, 1993*: The State filed an emergency motion in the Ninth Circuit to reconsider and vacate its order of remand.

33. *May 7, 1993*: A divided Ninth Circuit *en banc* panel denied the State's motion for reconsideration of the order of remand in a published, one sentence order. Judge O'Scannlain, joined by Judge Kleinfeld, dissented, concluding that:

> While the further delay to be caused by this remand order may not be egregious, it is symptomatic of this court's handling of this case. . . . Absent any indication by this court that the district court erred -- by holding that Campbell was denied a hearing on this issue

altogether or that the hearing given was somehow inadequate as a matter of law – I can see no basis to remand for a new evidentiary hearing.

See Appendix 2 at pp. 2-3.

IV. REASONS FOR GRANTING THE WRIT

A. Introduction

The Ninth Circuit's order should be summarily vacated because Campbell has already received an evidentiary hearing on that issue in 1989 and because the Ninth Circuit has failed to identify any error committed by the district court during that 1989 evidentiary hearing that would entitle Campbell to a remand. Rather, the *en banc* court merely concluded that it "would be assisted in [its] decision if [it] had the benefit of an evidentiary hearing." *See* Appendix 1.

This case, involving Campbell's appeal from the denial of his second federal habeas corpus petition, has now been pending in the Ninth Circuit for more than four years, with no sign of an ultimate resolution by that court in sight. More than a year ago, this Court found that the state of Washington had sustained severe prejudice as a result of the inordinate delays in Campbell's case, and concluded that any further delays in the Ninth Circuit's disposition of this matter would be subject to "a most rigorous scrutiny" in this Court if the State sought further relief. *In re Blodgett*, ___ U.S. ___, 112 S. Ct. 674, 676-77 (1992). Because an evidentiary hearing is unwarranted and will only exacerbate the severe prejudice the State has already

suffered, the State respectfully requests that this Court summarily vacate the Ninth Circuit's order of remand.

B. Legal Standard

Pursuant to 28 U.S.C. § 1651(a), this Court has jurisdiction to review, by extraordinary writ, an interlocutory order of the Court of Appeals. The present case is one of such imperative public importance that deviation from the normal process of review is justified. This Court has recognized the strong interest a state has in exercising its sovereign power to enforce its criminal laws. *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454 (1991). "Reexamination of state convictions on federal habeas 'frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Id.* at 1469 (citations omitted). If the extensive delay in resolving *Campbell's* appeal continues, the state of Washington will suffer further harm.

The Supreme Court may issue writs of mandamus to inferior courts pursuant to 28 U.S.C. § 1651, the All Writs Act. *Marbury v. Madison*, 1 Cranch 137 (1803); *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943); *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The authority of the Court to issue writs of mandamus extends to those cases that are within its appellate jurisdiction, although no appeal has yet been perfected. *Roche*, 319 U.S. at 25; *Dean Foods*, 384 U.S. at 603.

Mandamus is appropriate both to confine an inferior court to the lawful exercise of its prescribed jurisdiction and to compel the court to exercise its authority when it has a duty to

do so. *Roche*, 319 U.S. at 26; *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978). This Court has held:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, ___ U.S. ___, 112 S. Ct. 674, 676 (1992). Mandamus should issue when a federal court fails in its duty to promptly decide a capital case.

The State respectfully requests this Court to issue an Extraordinary Writ of Certiorari, or, in the alternative, Prohibition or Mandamus, summarily vacating the April 28, 1993 order of the United States Court of Appeals for the Ninth Circuit.

C. Vacating the Ninth Circuit's Order Will Aid This Court in the Exercise of Its Appellate Jurisdiction

Until the Ninth Circuit renders a final decision in this case, this Court is deprived of the opportunity to exercise its power to review the Campbell case by writ of certiorari. The substance of Campbell's appeal lies unattended before the Ninth Circuit, offering neither party the opportunity for a final decision and final review by this Court. The Ninth Circuit's order granting an evidentiary hearing on a matter unrelated to Campbell's guilt or innocence adds to the delay and further hampers this Court's appellate jurisdiction. The circuit court is reframing the issues before it and attempting to remake the

record upon which it will decide those issues. However, since the Ninth Circuit has not yet ruled upon Campbell's claims, the State is deprived of the opportunity to seek review in this Court. If the Ninth Circuit had rendered a final decision holding that Campbell had been deprived of an evidentiary hearing and remanding for another, the State would have immediately sought certiorari review of that decision in this Court. By entering an interlocutory order of remand, the circuit court has attempted to insulate its order from review by this Court. Only summary vacation of the Ninth Circuit's order will allow this Court to exercise its review powers in a timely and meaningful fashion.

D. The State Will be Irreparably Injured if the Requested Relief is Not Granted

If this Court does not vacate the Ninth Circuit's order, the unnecessary delay resulting from another evidentiary hearing and the resulting further appellate review of the results of that hearing will cause the State irreparable harm. This Court recognized more than a year ago that "the State of Washington has sustained severe prejudice" by the stay of execution issued by the Ninth Circuit in the *Campbell* case, and that further delay would result in further harm. *In re Blodgett*, 112 S. Ct. at 676. If the order of remand is not summarily vacated, then the state of Washington will be further prevented from exercising its sovereign power to enforce its criminal law; an interest which this Court has held is to be given great weight. *In re Blodgett*, 112 S. Ct. at 676 (citing *McCleskey v. Zant*, 499 U.S. ___, 111 S. Ct. 1454 (1991)). This inability to exercise its sovereign power will result in irreparable harm to the State.

E. The State Has Demonstrated a Clear Legal Right to Relief

This Court has recognized the important issues involved in the *Campbell* case, and authorized the State to seek mandamus or other extraordinary relief by motion or petition if unnecessary delays continue in the disposition of this case. *In re Blodgett*, 112 S. Ct. at 677. The Ninth Circuit's interlocutory order of remand requiring an evidentiary hearing in this case is clear error and an abuse of discretion, indisputably entitling the State to relief. Despite the conclusory nature of Campbell's claim that hanging is unconstitutional, the district court afforded him a broad opportunity to present evidence on this and other claims during the 1989 evidentiary hearing. Campbell failed to present evidence at that hearing and has shown no excuse for this failure.

Campbell presented only a conclusory allegation in his second petition that hanging was *per se* cruel and unusual punishment. Raising a purely legal question, Campbell was not entitled to an evidentiary hearing on his claim in 1989. Because hanging, a traditional method of execution, is presumptively constitutional, Campbell failed to make out either a factual or legal entitlement to relief in his second petition.

Despite the unmistakable directive from this Court, in *In re Blodgett*, 112 S. Ct. at 676, to "take all steps necessary to ensure a prompt resolution of [this] matter," Campbell's second petition has now entered its fifth year of review before the circuit court. Without any indication that the district court erred during the 1989 evidentiary hearing, the Ninth Circuit has ignored the Constitution's directive to decide the case presented by the

parties, and instead has remanded for another evidentiary hearing because it believes the record can be made better given a second opportunity.

1. Legal Standard For Stay of Execution And Evidentiary Hearing

In order to be entitled to a stay of execution, the burden is on the federal habeas petitioner to demonstrate that there are "substantial grounds upon which relief might be granted." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). Federal courts have the authority to expedite consideration of federal habeas petitions and requests for stays of execution, particularly in cases involving second or successive habeas petitions. *Barefoot*, 463 U.S. at 895; *In re Blodgett*, 112 S. Ct. at 676. It is an abuse of discretion for a district court to stay an execution pending the disposition of a second or successive petition if the petitioner fails to present substantial grounds upon which relief might be granted. *Delo v. Stokes*, 495 U.S. 320 (1990).

An evidentiary hearing is mandatory in a federal habeas proceeding only if the petitioner "alleges facts which, if proved, would entitle him to relief." *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (emphasis added). In other words, the district court must be presented with allegations of material fact before the petitioner is entitled to a plenary federal evidentiary hearing. *Townsend*, 372 U.S. at 313. Conversely, no evidentiary hearing is required if the claim presents a purely legal question or if the evidence proffered by the petitioner is "tentative and fragmentary" or conclusory. *Maggio v. Williams*, 464 U.S. 46, 50 (1983); *Blackledge v. Allison*, 431 U.S. 63, 75-76 (1977);

Advisory Committee Note to Rule 4, Rules Governing § 2254 Cases. Moreover, the petitioner must have previously afforded the state courts a full and fair opportunity to address the merits of his claim, a requirement that is not met by the mere statement of a federal claim in state court. *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S. Ct. 1715, 1720 (1992).

2. Although He was Not Entitled to an Evidentiary Hearing, the District Court Exercised Its Discretion and Granted Campbell a Full and Fair Evidentiary Hearing

This Court concluded that the district court "acted with commendable dispatch" in conducting an evidentiary hearing on Campbell's second petition and rendering a prompt decision. *Blodgett*, 112 S. Ct. at 675. The record is clear that Campbell was given the opportunity to present whatever evidence he wanted to present in support of his claims, including his three hanging claims. The district court did not deny or "fail to grant" him an evidentiary hearing. Instead, Campbell and his attorneys made a strategic decision to concentrate their efforts on his waiver and ineffectiveness claims, presenting testimony and declaratory evidence in support of those claims. The district court did not limit Campbell in any way, and instead, allowed him to present any evidence he wanted in support of his claims. That Campbell may have chosen to focus on claims he felt were more important, i.e., claims that would entitle him to a new

trial, does not mean that he was denied an opportunity to present evidence on the issue of hanging.[8]

Ultimately, any challenge to the district court's 1989 evidentiary hearing is really a challenge to the denial of Campbell's motion for a stay of execution. Throughout the 1989 proceedings, Campbell and his attorneys complained of being "forced" or "compelled" to conduct an evidentiary hearing and requested that the district court stay the execution so that they could have more time to prepare for their presentation. Neither Campbell nor his attorneys made an offer of proof regarding any evidence they would present on the hanging issues if the evidentiary hearing were postponed.[9] Indeed, one of Campbell's own witnesses testified that Campbell's attorneys would first have to research Claims 5.17 and 5.18 to decide whether they were even legitimate claims to raise on federal habeas and then to determine whether the claims had any factual basis. Campbell was not entitled to an indefinite stay of execution based upon his self-serving assurance that he would then somehow be able to determine whether his claims had any

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[8]Indeed, Campbell's Claim 5.18 (alleging that Campbell is terrified of hanging and that selecting lethal injection would violate his religious principles) would appear to require, at a minimum, Campbell's testimony to explain and make more specific an otherwise unsupported and conclusory allegation. However, Campbell was present throughout the March 27, 1989 evidentiary hearing and could have testified, but, for reasons unknown to the State, chose not to testify.

[9]It should be noted that, in any event, no court has ever found hanging to be cruel and unusual punishment. IV(E)(4), *infra*.

factual basis or legal merit.[10] This Court has observed that the procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error. *Barefoot v. Estelle*, 463 U.S. at 887-88.[11] Moreover, Campbell was not entitled to an evidentiary hearing based upon his bare allegations, though the district court did not deny Campbell the opportunity to present whatever evidence he wished to present concerning Claims 5.16, 5.17 and 5.18. Campbell received a full and fair evidentiary hearing on his hanging claims, and his strategic decision to pursue other claims does not change that fact.

3. Campbell Was Not Entitled to an Evidentiary Hearing

Campbell was not entitled to an evidentiary hearing on his unsupported allegations concerning hanging because he did not allege facts which, if proven, would entitle him to relief. As an initial matter, Campbell's first challenge to hanging

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[10]As the three-judge panel correctly observed, Campbell had well over three years – from July 1985 (the issuance of the first federal court stay of execution) until March 1989 – in which to litigate any claims he sought to raise in his second state personal restraint petition. *See Campbell*, 978 F.2d at 1516-17. Thus, any contention that Campbell had inadequate opportunity to prepare and present his habeas claims to the district court in 1989 is grossly inaccurate. The "emergency" situation Campbell confronted in 1989 was an emergency of Campbell's own making.

[11]Granting Campbell a continuance in connection with his evidentiary hearing would necessarily have required granting him a stay of execution. Therefore, the district court's scheduling of Campbell's evidentiary hearing must be viewed under the *Barefoot* standard.

(Claim 5.16) raised a legal question only, alleging that hanging was cruel and unusual punishment *per se*. No evidentiary hearing is necessary to resolve such a purely legal question.[12]

With respect to Campbell's two other challenges to hanging (lack of a qualified hangman and the choice between hanging and lethal injection), Campbell's claims were not supported by any evidence at all. Campbell produced affidavits and testimony concerning his absence from jury selection and his ineffective assistance claims. The district court also had before it the transcript of the state court proceedings during which Campbell waived his presence at jury selection. Thus, Campbell arguably alleged facts on his waiver and ineffectiveness claims sufficient to warrant further inquiry. In contrast, Campbell alleged no facts regarding his hanging claims that would have entitled him to an evidentiary hearing. His Claims 5.16, 5.17, and 5.18 were conclusory, lacking in specifics, and unsupported by any declaratory or other evidence. Campbell's bare allegations did not give rise to a genuine dispute of material fact and, therefore, did not warrant an evidentiary hearing.

4. It Is Clear Error for the Ninth Circuit to Continue a Stay of Execution and Provide Campbell a Second Chance for an Evidentiary Hearing on Hanging Where the Factual and Legal Basis for Campbell's Claims are Plainly Lacking

The Ninth Circuit's error in providing Campbell a second chance to present evidence on the issue of hanging is

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[12]Campbell's own witnesses testified that Claim 5.16 was a matter of law only.

even more stark when viewed in light of Campbell's burden. Hanging is a traditional method of execution that does not involve anything more than the infliction of pain necessarily associated with the humane extinguishment of human life and is presumptively constitutional.

This Court has declared that:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. . . . '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' . . . The deference we owe to the decisions of the state legislatures under our federal system . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'

Gregg v. Georgia, 428 U.S. 153, 174-76 (1976) (emphasis added). Thus, the courts play a limited role in testing the validity of a statutorily imposed punishment and may not act as legislators. *Gregg*, 428 U.S. 153, 174-76 (1976); *see also State v. Rupe*. 101 Wn.2d 664, 698, 683 P.2d 571 (1984).

A court may not disturb the legislature's choice of a method of punishment under the authority of the Eighth Amendment unless the punishment involves torture, lingering death, or the unnecessary and wanton infliction of pain. *Gregg*, 428 U.S. at 171-74; *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). "The cruelty against

which the Constitution protects a convicted man is . . . not the necessary suffering involved in any method employed to extinguish life humanely." *Louisiana v. Resweber*, 329 U.S. 459, 464 (1947). The Eighth Amendment requires that "[t]he punishment must not involve the unnecessary and wanton infliction of pain." *Gregg*, 428 U.S. at 173.

Campbell cannot assert that hanging was considered cruel and unusual at the time the Bill of Rights was adopted.[13] Campbell's arguments may succeed only if hanging is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). However, traditional methods of execution are entitled to a presumption of constitutionality. The *Trop* Court held that only "technique[s] outside the bounds of . . . traditional penalties [are] constitutionally suspect." *Trop*, 356 U.S. at 100.

In discerning whether a punishment is cruel and unusual, a court must not make a subjective assessment of the modern standards of decency, but must instead "look to the objective indicia that reflect the public attitude toward a given sanction." *Gregg*, 428 U.S. at 173.[14] The most reliable objective evidence of contemporary values are the pronouncements of the states' legislatures. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

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[13]Prior to the 1900's, hanging was the universally accepted form of execution in this country. *State v. Frampton*, 95 Wn.2d 469, 492, 627 P.2d 922 (1981).

[14]This Court has made it clear that "it is *American* conceptions of decency that are dispositive." *Stanford v. Kentucky*, 492 U.S. 361, 109 S. Ct. 2969, 2975 n. 1, 106 L. Ed. 2d 306 (1989) (emphasis in the original). The sentencing practices of other countries are irrelevant in determining whether a punishment is cruel and unusual. *Id.*

A method of punishment does not violate the constitutional prohibition against cruel and unusual punishment merely because the punishment involves the infliction of some pain. The Eighth Amendment prohibits only barbarous and torturous methods of punishment, and those punishments which involve the "unnecessary and wanton infliction of pain." *Gregg*, 428 U.S. at 171-74. As Justice Scalia recently noted: "[t]the prohibitions of cruel and unusual punishments . . . would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for gratification of fiendish passion." *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680, 2694 (1991). However, this Court has also held that the Legislature is not required "to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane. . . ." *Gregg*, 428 U.S. at 175.

Campbell did not offer one shred of evidence or factual support in either his second petition or at the 1989 evidentiary hearing to suggest that hanging involves lingering death or the infliction of pain beyond that necessary for the humane extinguishment of life. He offered no experts, no anecdotal reports, no factual history of death by hanging to support his assertion. Campbell presented not even the barest of evidence that hanging was the equivalent "of the rack or the stake, . . . horrid modes of torture, devised by human ingenuity for gratification of fiendish passion." Campbell failed in this regard because hanging is a presumptively constitutional, traditional method of execution that has been in use in this country for well over a hundred years.

Moreover, every court, including the Washington Supreme Court, that has considered hanging as a method of execution, has found it constitutional. Thus, Campbell's assertion was as lacking in legal foundation as it was devoid of factual support.

The Washington Supreme Court held that hanging is not the type of punishment proscribed by the Washington and United States Constitutions. *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981). The *Frampton* Court held that the Legislature is better equipped to determine which method of execution is most appropriate for the State of Washington. *Frampton*, 95 Wn.2d at 512-514, and 527 (Brachtenbach, C.J. and Rosellini, Dore, Stafford, Hicks and Dimmick, JJ., finding hanging is not cruel and unusual punishment).

In *State v. Campbell*, 112 Wn.2d 186, 770 P.2d 620 (1989), the court unanimously declined to find hanging unconstitutional, thereby reaffirming its decision in *Frampton* that hanging does not constitute cruel and unusual punishment. *Campbell*, 112 Wn.2d at 192.

Other courts have held that hanging comports with the Eighth Amendment. *See Deshields v. State*, 534 A.2d 630 (Del. 1987), *cert. denied*, 486 U.S. 1017 (1988) (hanging is not cruel and unusual punishment); *State v. Coleman*, 185 Mont. 299, 605 P.2d 1000 (1979), *cert. denied*, 446 U.S. 970 (1980) (hanging is not cruel and unusual punishment); *McKenzie v. Osborne*, 195 Mont. 26, 51, 640 P.2d 368 (1981) (relying upon *Coleman* to deny petitioner's claim that hanging is cruel punishment); *Fitzpatrick v. State*, 638 P.2d 1002, 1011 (Mont. 1981) (deferring to the Legislature in selecting the method of

execution); *State v. Kilpatrick*, 201 Kan. 6, 439 P.2d 99 (1968) (Legislature has the sole authority to determine the method of execution, and the court would not disturb the Legislature's decision absent clear evidence that hanging is actually cruel and unusual punishment).[15]

While the federal courts have never addressed the issue of whether judicial hanging constitutes a cruel and unusual method of punishment, the courts have determined that other traditional methods of execution are constitutional. In every case, the courts have found that these traditional, legislatively prescribed methods of execution are constitutional. *See Louisiana v. Resweber*, 329 U.S. 459 (1947) (death by electrocution is not cruel punishment); *Wilkerson v. Utah*, 99, U.S. 130, 136 (1879) (death by firing squad is not cruel punishment); *Andrews v. Shulsen*, 802 F. 2d 1256 (10th Cir. 1986) (claim that death by firing squad violates the Eighth Amendment is without merit), *cert. denied*, 485 U.S. 919 (1988); *Johnson v. Kemp*, 759 F. 2d 1503 (11th Cir. 1985) ("contention that death by electrocution violates the Eighth Amendment is frivolous"); *Watson v. Blackburn*, 756 F.2d 1055 (5th Cir. 1985) (claim that death by electrocution is cruel and unusual punishment is without merit), *cert. denied*, 476 U.S. 1153 (1986); *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983)

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[15]Two other states have also held hanging to be a constitutionally permissible method of execution. The Oregon Supreme Court determined that hanging is not cruel and unusual punishment. *State v. Butchek*, 121 Ore. 141, 253 P. 367, 370 (Ore. 1927). Similarly, the Iowa Supreme Court held that hanging does not violate the Constitution because it is not torture or mutilation nor does it "shock the mind of every [person] possessed of common feeling. . . ." *State v. Burris*, 194 Iowa 628, 190 N.W. 38, 42 (1922).

(electrocution is a constitutional method of execution); *see also Thomas v. Jones*, 742 F. Supp. 598, 607 (S.D. Ala. 1990) (rejecting Eighth Amendment challenge to execution in Alabama's electric chair); *Godfrey v. Francis*, 613 F. Sup. 747, 764 (D. Ga. 1985) (rejecting Eighth Amendment challenge to electrocution), *aff'd*, 836 F.2d 1557 (11th Cir. 1988) (*en banc*), *cert. dismissed*, 487 U.S. 1264 (1988).

Campbell has failed in state and federal court to make any showing that the presumptively constitutional and traditional execution method of hanging will involve more than the infliction of pain necessarily associated with the humane extinguishment of life. Now, despite the dearth of factual or legal support for Campbell's bare assertion that hanging violates the Eighth Amendment and despite the fact he was provided the opportunity to attack this method of execution in 1989, Campbell has convinced the Ninth Circuit to reopen the door for further delay and re-examination of this claim. Again, the State is faced with a severe compromise of its interest in finalizing the criminal judgment in Campbell's case, while the Ninth Circuit offers neither plausible explanation nor rationale for allowing Campbell a renewed chance to "get it right."

V. CONCLUSION

For the reasons stated above, the State respectfully prays that this Court grant its petition for Extraordinary Writ of Certiorari, or in the Alternative, Prohibition or Mandamus, to

the United States Court of Appeals for the Ninth Circuit, and summarily vacate that court's of remand.

DATED this 17th day of May, 1993.

Respectfully submitted,

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APPENDIX 1

[FILED]
[April 28, 1993]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35210
DC NO. CV-89-456-C

ORDER

CHARLES CAMPBELL,

Petitioner-Appellant,

-vs-

JAMES BLODGETT, Superintendent, Washington State Penitentiary, Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

Before: WALLACE, Chief Judge, BROWNING, TANG, POOLE, D.W. NELSON, REINHARDT, BEEZER, WIGGINS, THOMPSON, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

The *en banc* court has chosen to address whether hanging is cruel and unusual punishment under the Eighth Amendment. We would be assisted in our decision if we had the benefit of an evidentiary hearing, with findings and conclusions

by the district court. Therefore, we remand the case for thirty-five (35) days for that purpose. The district court should advise us if additional time is needed.

The evidentiary hearing should be limited to the hanging issue under the Eighth Amendment; it should not extend to the issue of whether the choice between hanging and lethal injection is a constitutional violation.

This *en banc* court retains jurisdiction.

Judges O'Scannlain and Kleinfeld dissent from this order.

APPENDIX 2

[FILED]
[May 7, 1993]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35210
DC NO. CV-89-456-C

ORDER

CHARLES CAMPBELL,

Petitioner-Appellant,

-vs-

JAMES BLODGETT, Superintendent, Washington State Penitentiary Walla Walla, Washington; KENNETH O. EIKENBERRY, Attorney General, State of Washington,

Respondents-Appellees.

Filed: May 7, 1993

Before: WALLACE, Chief Judge, BROWNING, TANG, POOLE, D.W. NELSON, REINHARDT, BEEZER, WIGGINS, THOMPSON, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

A majority of the *en banc* court has voted to deny respondents-appellees' motion for reconsideration of order of remand.

COUNSEL

James E. Lobsenz, Carney, Badley, Smith & Spellman, Seattle, Washington, for petitioner-appellant.

Paul D. Weisser, Assistant Attorney General, and John M. Jones, Assistant Attorney General, Olympia, Washington, for respondents-appellees.

Campbell v. Blodgett, No. 89-35210

O'SCANNLAIN, Circuit Judge, with whom KLEINFELD, Circuit Judge, joins, dissenting:

A majority of the *en banc* court "has chosen to address whether hanging is cruel and unusual punishment under the Eighth Amendment" and has concluded that it "would be assisted . . . if it had the benefit of an evidentiary hearing." The majority, however, has failed to identify any error committed by the district court that would entitle Campbell to a remand. I dissented from the order of remand and would now grant the state's well-taken motion for reconsideration. I cannot agree that an appellate court should frame issues not before it or determine how the record is made.

In our system of justice, an appellate court decides issues properly presented to it by the parties on the record they made before the trial court. When a party has had the opportunity for a full and fair evidentiary hearing, we are bound by the record the party has chosen to make. In this, Campbell's second federal habeas petition, an evidentiary hearing *was* held by the district court on March 27, 1989. At that time, the district court indicated that it would hear *any* evidence Campbell chose to offer. Campbell offered evidence regarding his waiver of the right to be present during voir dire and the ineffective assistance of counsel; he chose to make only the barest of allegations concerning the constitutionality of hanging.

Over ten years have elapsed since Campbell was sentenced to death on December 17, 1982. He filed his first federal habeas petition in 1985, which was eventually denied by this court in 1987. *See Campbell v. Kincheloe*, 829 F.2d 1453

(9th Cir. 1987) (rejecting the contention that Washington's capital punishment statute is unconstitutional), *cert. denied*, 488 U.S. 948 (1988). The claim he raises, that hanging is unconstitutional, is both obvious and fundamental and was indeed raised in earlier state proceedings. Thus, while I recognize that the evidentiary hearing was held on short notice, I simply cannot accept Campbell's contention that he was not given adequate time to present this claim when he filed this new petition in 1989. Presentation of claims seriatim, saving some for many years until just before the scheduled execution, if indulged, thwarts reasoned resolution.

Campbell had the strongest of incentives to pursue all of his claims fully, yet he chose to focus on claims other than the constitutionality of hanging. He has not shown cause for failing to present evidence concerning this issue despite the clear opportunity to do so. For these reasons, I would decide this appeal on the record presently before us. Indeed, the Constitution binds us to decide only the case presented to us, not other issues that may interest us. It is no more legitimate for us to choose to reach issues not properly pursued by a litigant than it is for us to remand for an evidentiary hearing because we believe the record can be made better given a second opportunity.

Over a year ago, the Supreme Court reminded us that the State of Washington has sustained "severe prejudice" by the stay of execution in this case, which is now over four years old. *In re Blodgett*, 112 S. Ct. 674, 676 (1992). While the further delay to be caused by this remand order may not be egregious, it is symptomatic of this court's handling of this case. The Supreme

Court has definitively ruled that the death penalty itself is not unconstitutional. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976). R.C.W. § 10.95 is the duly enacted law of the State of Washington. The people of Washington have a legitimate interest in seeing their criminal statutes carried out in a timely manner. *See Blodgett*, 112 S. Ct. at 676. Absent any indication by this court that the district court erred--by holding that Campbell was denied a hearing on this issue altogether or that the hearing given was somehow inadequate as a matter of law--I can see no basis to remand for a new evidentiary hearing.

I respectfully dissent.